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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 SECURITIES AND EXCHANGE
5 COMMISSION,

6 Plaintiff,

7 v.

23 Civ. 287 (ER)

8 GEMINI TRUST COMPANY, LLC and
9 GENESIS GLOBAL CAPITAL LLC,

10 Defendants.

Telephone Conference

11 -----x
12 New York, N.Y.
13 May 16, 2023
14 11:00 a.m.

15 Before:

16 HON. EDGARDO RAMOS,

17 District Judge

18 APPEARANCES

19 EDWARD J. REILLY
20 LAURA E. MEEHAN
21 Attorneys for Plaintiff

22 JFB LEGAL, PLLC
23 Attorneys for Defendant Gemini
24 BY: JOHN F. BAUGHMAN
25 ANDREW C. BOSSE
ELIZABETH LEE

MORRISON COHEN, LLP
Attorneys for Defendant Genesis
BY: JASON P. GOTTLIEB
DANIEL C. ISAACS
WILLIAM ROTH

N5gWgemC

(Case called; appearances noted)

THE COURT: Good morning, everyone. This is Judge Ramos.

This matter is on for a premotion conference. I note for the record that it is being conducted by telephone. This is also the first time that the parties have appeared before me. We are here at the request of the defendants.

Mr. Reilly, let me begin with you. Why don't you tell me what this case is about.

MR. REILLY: Thank you, your Honor.

This case is about a crypto asset lending program called Gemini Earn in which defendants raised billions of dollars from hundreds of thousands of investors and then suddenly, in November 2022, the defendants paused the program, froze all the investors' assets, and since then over 300,000 retail investors have been unable to withdraw nearly a billion dollars in assets. Our complaint more than adequately alleges that through this unregistered offer and sale of billions of dollars worth of securities, defendants Gemini and Genesis have violated Sections 5(a) and 5(c) of the Securities Act of 1933.

THE COURT: Let me ask you, what is a crypto assets lending program?

MR. REILLY: So, under this program, your Honor, as we allege, Genesis was in the business of accepting crypto assets from retail investors, pooling and aggregating those assets and

N5gWgemC

1 then lending them out to other counterparties, I believe,
2 typically, as we allege, institutional counterparties. In
3 exchange for interest rates that would change over time, Gemini
4 took the crypto assets from the retail investors, pooled them
5 and then would receive an interest rate from the counterparty,
6 and essentially part of the spread would go back to the retail
7 investors, and Genesis would receive part of it as well.

8 Gemini's role, as we allege, is that retail investors
9 would create an account with Gemini if they already did not
10 have an account with Gemini for the crypto assets, and then
11 Gemini effectively would be an agent and facilitate the
12 exchange of the crypto assets from the possession of the retail
13 investors into the hands of Genesis in exchange for an agent
14 fee. The program lasted for about a year and a half before
15 Genesis froze the program, and again, as I mentioned, none of
16 the retail investors have seen their assets since then.

17 THE COURT: By crypto assets, I take it, Mr. Reilly,
18 these are Bitcoin and Dogecoin, that type of thing?

19 MR. REILLY: Correct, your Honor.

20 I believe there were over a dozen different kinds of
21 assets, crypto assets that Genesis and Gemini published that
22 were available to be invested into the Gemini Earn program, and
23 they set -- they identified what assets they were willing to
24 accept, and they set the interest rate.

25 THE COURT: The retail investors only invested their

N5gWgemC

1 own crypto assets, correct?

2 MR. REILLY: Correct, your Honor.

3 THE COURT: And what happened, do you know, that
4 resulted in Genesis ultimately determining not to allow them to
5 obtain their assets?

6 MR. REILLY: Your Honor, as we allege in the
7 complaint, Genesis experienced a liquidity crisis. I don't
8 want to speculate on what caused that, but they essentially
9 were not able to -- or they believed that they would not be
10 able to redeem the assets and so voluntarily froze the program.
11 After we filed our complaint before you, your Honor, Genesis
12 entered bankruptcy.

13 THE COURT: OK. Thank you.

14 Mr. Baughman, are you going to be speaking on behalf
15 of Gemini?

16 MR. BAUGHMAN: Yes, your Honor.

17 THE COURT: What do you want to do?

18 MR. BAUGHMAN: Could I just give a couple of
19 additional facts that may be relevant to your Honor's sort of
20 framing of the case?

21 THE COURT: Absolutely.

22 MR. BAUGHMAN: And then Genesis will have its
23 opportunity as well, of course.

24 You know, Mr. Reilly, who I respect very much, has
25 done a good job of sort of laying out the framework, but I want

N5gWgemC

1 to clarify one thing, which is the allegation in this case
2 relates to the sale of allegedly unregistered securities. I
3 want to be absolutely clear the SEC is not contending in this
4 case that the Bitcoin or the Ethereum or the Dogecoin is the
5 security at issue.

6 What the SEC is alleging is that the document called
7 the master loan agreement is a security. And what the master
8 loan agreement is is an agreement between individual earn
9 users, individuals, as lender; Genesis as borrower; and Gemini
10 as agent. And so the allegation -- is that document, is that
11 loan agreement the security?

12 So I just wanted to clarify that.

13 We do think that the case presents very unique issues
14 for your Honor's consideration, and I think that is why the
15 parties are proposing, at least considering making motions to
16 dismiss. Because my friends at Genesis took the lead on the
17 basis for the motion, I will defer to them to describe it,
18 although I do want to flag for the Court's attention that in
19 preparing for, I think it is likely that Gemini will have one
20 unique argument that is unique to them that just wouldn't apply
21 to Genesis.

22 I wanted to get that on the record, but I will pass to
23 my friends at Genesis.

24 Thanks.

25 MR. REILLY: Your Honor, may I clarify one thing?

N5gWgemC

1 THE COURT: Sure.

2 MR. REILLY: Thank you, your Honor.

3 And I don't intend to split hairs unnecessarily with
4 what Mr. Baughman just said, but I just want to be very clear
5 about what we've alleged are the unregistered securities here
6 and what actually was the unregistered offer and sale of
7 securities.

8 So just to be clear, what we've alleged in the
9 complaint is that the Gemini Earn agreements were notes and
10 they were offered and sold through the Gemini Earn program as
11 security notes under the test articulated in *Reves v. Ernst &*
12 *Young*. And then, separately, we are alleging that the offer
13 and sale of the Gemini Earn agreement through the Gemini Earn
14 program constituted the offer and sale of investment contracts
15 under a straightforward allegation in *Howey*.

16 Thank you.

17 THE COURT: OK.

18 Mr. Gottlieb.

19 MR. GOTTLIEB: Thank you, your Honor.

20 And I do appreciate the clarifications that my
21 colleagues Mr. Baughman and Mr. Reilly just made.

22 This case actually has very little to do with crypto,
23 and it has more to do with what is a security, what is a note?
24 The SEC has filed a single cause of action for violation of
25 Section 5 of the 1933 Act for allegedly issuing unregistered

N5gWgemC

1 securities, but what the SEC has alleged in its complaint is a
2 program of lending and borrowing. It's a program of loans;
3 hence, not all financial transactions are securities offerings.
4 Sometimes, your Honor, a loan is just a loan.

5 We would intend to show in our motion to dismiss that
6 the allegations in the complaint do not add up to a securities
7 offering either under the standards of the *Howey* test, because
8 that's the test for investment contracts, or the *Reves* test,
9 from *Reves v. Ernst & Young*, a 1990 Supreme Court case that
10 talks about when a note is a security note versus when
11 something is just a loan. Our motion would go through the
12 allegations in the complaint to show that while the SEC has
13 successfully alleged that Genesis and Gemini were engaged in a
14 program of borrowing and lending, they were not engaged in any
15 kind of securities transactions.

16 THE COURT: OK.

17 Mr. Reilly, I'll give you a chance to respond briefly
18 if you wish.

19 MR. REILLY: Thank you, your Honor.

20 It's our position that briefing on defendants'
21 proposed motion to dismiss is unnecessary because the
22 defendants' arguments that they laid out in their letters
23 plainly cannot establish that our complaint has failed to plead
24 a violation of Section 5. The defendants have presented you
25 with their best arguments, and additional briefing would be

N5gWgemC

1 more of the same. And as we've made clear in our letter, under
2 the legal standard for a ruling on a motion to dismiss, the
3 defendants' arguments fail to make a credible argument because
4 we've already more than adequately pled that there's been an
5 unregistered offer and sale of securities, in violation of
6 Section 5.

7 I would be happy to elaborate on why their arguments
8 with respect to the *Reves* test, the *Howey* test and their motion
9 with respect to relief are lacking merit.

10 THE COURT: No need. No need, Mr. Reilly.

11 Mr. Baughman, I understand you said you had a
12 separate, discrete issue that you wished to raise.

13 MR. BAUGHMAN: I just want to clarify, and if I didn't
14 make this clear in the letter, I apologize to the Court.

15 Gemini has a separate argument that it does not
16 qualify as a statutory seller under the securities laws, which
17 we would like to present in addition to the other arguments
18 that are going to be made.

19 THE COURT: OK.

20 Now, I understand that the parties have conferred and
21 agreed upon a briefing schedule, is that right?

22 Mr. Reilly.

23 MR. REILLY: Yes, your Honor.

24 THE COURT: And Mr. Gottlieb.

25 MR. GOTTLIEB: Yes, that's correct, your Honor. That

N5gWgemC

1 agreed schedule was laid out in our premotion letter.

2 Under that schedule, of course, assuming that it's
3 acceptable to the Court, the motion to dismiss will be filed by
4 May 26. The SEC's opposition will be due by July 7, and reply
5 briefs from the defendants will be due by August 4.

6 THE COURT: OK. And do the defendants anticipate
7 filing one document or two?

8 MR. BAUGHMAN: Your Honor, I think -- obviously we
9 haven't completed it yet, but in all likelihood, there will be
10 one motion for, on the "is it a securities" question, and then
11 we will file a separate, short brief on the "are we a statutory
12 seller" question.

13 THE COURT: OK.

14 MR. BAUGHMAN: We will not double dip on the
15 securities argument.

16 THE COURT: That's what I was hoping to avoid. Very
17 well then.

18 Let me ask this -- and I will enter the schedule that
19 the parties agreed to -- have there been any settlement talks
20 as yet?

21 Mr. Reilly.

22 MR. REILLY: Yes, we've had preliminary settlement
23 negotiations with both parties that have not been successful.

24 THE COURT: OK. If you do decide to take up
25 settlement talks again and believe that the Court could be of

N5gWgemC

1 use to you, you can contact chambers and I can refer you to the
2 assigned magistrate judge -- in this case, it's Magistrate
3 Judge Katharine Parker -- or the court's mediation panel. But
4 I won't require that you do that at this time unless I hear
5 from you otherwise.

6 In the meantime, unless there's anything else that we
7 need to discuss today --

8 Mr. Reilly.

9 MR. REILLY: No. Thank you, your Honor.

10 THE COURT: Mr. Baughman.

11 MR. BAUGHMAN: No, your Honor. Thank you.

12 THE COURT: Mr. Gottlieb.

13 MR. GOTTLIEB: No, your Honor. Thank you for your
14 time today.

15 MR. BAUGHMAN: My only other question is if the court
16 reporter could give her information so we can order the
17 transcript.

18 THE COURT: Yes, she can do that as soon as I sign
19 off.

20 In the meantime, the motion schedule will be motions
21 due on May 26, the opposition on July 7 and the reply on August
22 4.

23 With that, I am signing off. Everyone stay well.

24 (Adjourned)